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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William A. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Reply Comments of Classic Telephone, Inc.

Dear Mr. Caton:

Enclosed for filing in the above-referenced matter please find an original and twelve (12) copies of the Reply Comments of Classic Telephone, Inc.

Any questions regarding this matter may be directed to the undersigned.

Sincerely,

John C. Dodge

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

To: The Commission

REPLY COMMENTS OF CLASSIC TELEPHONE, INC.

Classic Telephone, Inc. ("Classic"), by its attorneys, hereby files its Reply Comments in the above-captioned proceeding. The primary purpose of Classic's Reply Comments is to respond to the legally and factually unfounded arguments proffered by the City of Bogue, Kansas ("Bogue") in its comments in this proceeding. Bogue argues that, notwithstanding the enactment of a clear, broad law articulating a national vision for telecommunications policy, Congress did not intend for competition to reach and benefit rural America. Further, Bogue argues that, presuming such a statutory mandate does now exist, the Commission should issue regulations contrary to that mandate to insulate rural America from benefits of competition and open markets.

Bogue's Comments misread the Telecommunications Act of 1996, ignore conventions of statutory construction, mischaracterize Supreme Court precedent, and disregard fundamental market and economic principles. The Commission should be aware that Bogue's "flat earth" myopia arises out of a parochial, political incentive to keep Classic from serving the citizens of Bogue in honest competition with another local exchange carrier which Bogue has declared its preferred, monopoly provider. Nonetheless, Classic is compelled to respond to

Bogue's Comments to assure that the Commission is presented with a more reasoned and sensible view of the intent of Congress and the authority this Commission may exercise pursuant to Congress' direction.

I. BACKGROUND

The Commission should be aware that Bogue, Kansas has twice denied a local telephone franchise to Classic to provide telecommunications services within Bogue. Classic has agreed to buy the facilities of United Telephone Company of Kansas ("United") in Bogue, but Bogue has steadfastly refused to grant a local franchise under its Kansas statutory authority[1] on the grounds that Bogue cannot sustain competition for two local exchange carriers.[2] Classic has petitioned the Commission to preempt this unlawful action.[3] Bogue has also filed an opposition to Classic's request to create a "study area" to initiate participation in the Universal Service Fund.[4]

Viewed against this backdrop, Bogue's comments can be seen as little more than one element of a concerted effort to thwart the will of Congress and keep honest competition

[1] KAN. STAT. ANN. § 12-2001. A Municipality may not, however, grant an exclusive telephone franchise. KAN. STAT. ANN. § 12-2001(b)(3). United is operating with Bogue's conditional permission in Bogue but does not presently have a franchise to serve that community.

[2] A copy of the correspondence sent by Classic to Bogue repeatedly requesting a franchise is attached as Exhibit 1 to Classic's *Petition for Preemption of Local Entry Barriers Pursuant to 47 U.S.C. § 253(d)*, CCBPol 96-10 (filed Mar. 19, 1996).

[3] *See In the Matter of Classic Telephone, Inc., Petition for Preemption of Local Entry Barriers Pursuant to 47 U.S.C. § 253(d)*, CCBPol 96-10 (filed Mar. 19, 1996).

[4] *See* Opposition of Bogue, *Classic Telephone Inc.*, File No. AAD 95-171, *Joint Petition for Study Area Waiver* (filed Feb. 9, 1996).

from springing up in rural communities. The Commission, however, can proceed to dismiss Bogue's arguments secure in the knowledge that the Commission possesses both the legal authority and public policy grounding to adopt interconnection guidelines that effectively preempt the anticompetitive local initiatives that Bogue proposes

II. DISCUSSION

A. The Cities Misconstrue The Commission's Powers Of Preemption.

Bogue's essential argument is that Section 2(b) of the Communications Act, 47 U.S.C. § 152(b), trumps new Sections 251 and 252. reserving to state authority the exclusive ability to regulate interconnection and associated procedures for negotiation, arbitration and approval of intrastate interconnection agreements. Bogue Comments at 1-2. Bogue's reading of Section 152(b), however, ignores the extremely narrow scope of that provision. Bogue appears to argue that Section 152(b)'s restriction on federal regulation of intrastate *communications* prevents the Commission from preempting state oversight of *interconnection* arrangements which, of necessity, implicate facilities that will serve a dual purpose in handling intrastate *and* interstate traffic. The Supreme Court, however, held in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986) ("*Louisiana PSC*") that Section 152(b) constitutes . . . a congressional denial of power to the FCC to require state commissions to follow FCC *depreciation practices for* *intrastate ratemaking purposes.*"[5] Even if the 1996 Act preserves state power in the narrow area of intrastate regulatory accounting practices for telecommunications carriers, that power is limited to state oversight of telecommunications providers that are *already operating* in the state. In contrast, the provisions under discussion here contemplate the entry into states by new telecommunications providers who must be given assurance that state processes will not be used (as has Bogue's local franchising power) to erect an effective barrier to entry and competition.

Moreover, the second portion of the *Louisiana PSC* decision, which Bogue conveniently excludes, concerns situations in which preemption is appropriate if it is "not possible to separate the interstate and the intrastate components of the asserted FCC regulation." *Id.* at n. 4. Unlike the intrastate depreciation standards that were at issue in *Louisiana PSC*, new Section 252 anticipates interconnection between telecommunications carriers whose facilities very likely provide both interstate and intrastate services. The Commission would no doubt be hard pressed to cite an example of a circumstance where a common carrier[6] in this country provides only intrastate service over a given facility. Engineering principles and efficient use of facilities

[5] 476 U.S. at 374 (emphasis added). That portion of the Act referenced by Bogue, Section 152 concerns, *inter alia*, "charges," "classifications," and "practices" in connection with intrastate communication service. The Supreme Court, finding that these "technical terms" are "often used by accountants, regulators, courts, and commentators to denote depreciation treatment," specifically rejected the Commission's view that the terms were intended to refer only to "customer charges" and held that they also "embrace depreciation." *Louisiana PSC*, 476 U.S. at 371-72. In light of the Court's discussion of the meaning and purpose of Section 152, Bogue can hardly claim that interconnection agreements are rooted in "state regulation of depreciation for intrastate ratemaking purposes." *Id.* at 373.

[6] "Telecommunications carriers" are essentially common carriers. *See* 47 U.S.C. § 151(44), (46) (1996).

dictate that facilities support a variety of services; there are not separate lines for intrastate services. Given this reality, and unlike the *Louisiana PSC* facts, here there is no segregable "intrastate component" of our Nation's telecommunications system which must be insulated from overreaching federal authority.

As the Court observed in *Louisiana PSC*, "a basic underpinning of our federal system [is] that a state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 374 (citations omitted). Congress made clear its "full purpose and objectives" to develop a fully integrated, competitive, national telecommunications system when it passed the 1996 Act, generally, and Sections 251 and 252, specifically. Bogue is attempting to thwart that Congressional intent through its contorted reading of Section 152.

Bogue also tries to turn Section 251(d)(3) into support for its tortured analysis of *Louisiana PSC*. Bogue Comments at 3-4. Bogue argues that this section reserves entirely to the states jurisdiction over interconnection matters. *Id.* This is incorrect. As the Conference Committee explained, Section 251(d) requires the Commission to adopt regulations to implement the section by August 8, 1996, "and states that nothing precludes the enforcement of State regulations *that are consistent with* the requirements of new section 251."[7] Thus, Section 251(d)(3) does not, as Bogue argues, confirm state authority in all instances. Rather, as Congress

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[7] H.R. REP. NO. 458, 104th Cong., 2d Sess., *published at* 142 Cong. Rec. H1109 (Daily ed. Jan. 31, 1996) (emphasis added).

consistently intended, this Section provides that states retain interconnection oversight *only* to the extent such oversight is *consistent* with new federal law[8]

B. The Commission Should Not Adopt a Presumption Against Rural Competition.

Bogue next argues that Section 251 should be interpreted by the Commission to keep competition out of small cities like Bogue. In essence Bogue argues that, "absent some assurance that unduly economically burdensome competition will not be permitted to waste the investment," companies are unlikely to gamble on competition in rural markets. Bogue Comments at 7. As it has in other fora, Bogue reiterates its preference for a monopoly provider of telecommunications services. *Id.* Unfortunately for Bogue, Congress did not end the Act at Section 250 — Congress continued with a well-reasoned scheme for interconnection and entry in Sections 251, 252 and 253.

[8] Bogue's argument that 47 U.S.C. § 256 is a "plain statement" that the states retain jurisdiction over interconnection matters is also incorrect. This provision concerns interoperability of networks such that end users and vendors (as opposed to telecommunications carriers) have access to telecommunications networks. As the Conference Committee noted:

> The provision permits the Commission to participate, in a manner consistent with its authority and practice prior to the date of enactment of this Act, in the development of voluntary industry standards-setting organizations to promote interoperability. The purpose of the provision is to promote nondiscriminatory access to telecommunications networks by the broadest number of *users and vendors* of communications products and services.

H.R. REP. NO. 458, 104th Cong., 2d Sess., *published at* 142 Cong. Rec. H1113 (Daily ed. Jan. 31, 1996) (emphasis added). The provision does not address interconnection between carriers.

As stated in the Act's legislative history, the purpose of the 1996 Act is to:

> provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.[9]

Note that Congress includes *all* markets as potentially benefitting from competition, including rural markets. Now Bogue wants the Commission to ignore Congress's express will, based on a too expansive reading of the thoughtful interconnection exemption contained at Section 251(f). The Commission should not fall for this line of reasoning, for the simple reason that Bogue's factual rationale is wholly corrupted.

Bogue argues that rural communities will not enjoy advanced telecommunications offerings unless monopoly provision of such services is sustained. To prove its point, Bogue states that it had to de-franchise its existing monopoly provider for not providing acceptable or advanced services. Arguing that advanced services can only come from a monopolist when the community is trying to expel a monopolist for not providing such services is Carrollian logic, at best. What is truly driving Bogue's political position is an agreement with Rural Telephone Service Company, Inc. that it can be the monopoly provider. Such complicity clearly is now unacceptable under Section 253 of the Act. Congress intends for markets — real people making

[9] S. REP. NO. 230, 104th Cong., 2d. Sess. 1 (Feb. 1, 1996).

real choices about their telecommunications needs and desires — to regulate entry and services, not government at any level.

Bogue's observation that rural markets run the risk that carriers will not make investments due to limited market opportunities is overstated, and the community's fears for its own sake are ill-founded. First, Classic stands ready, willing and able to provide immediate competition in Bogue. Second, Congress specifically maintained high cost support, even for rural areas served by multiple carriers, so long as state commissions designate such carriers for support.[10] Classic has received such state designation. Third, Congress stated clearly that *advanced* universal service is now, for the first time, a statutory requirement, and provided new rights for rural schools, health care providers and libraries to gain access to advanced telecommunications services.[11] Classic intends to meet and exceed these requirements to succeed in the market.

What the Commission should *not* do — and indeed is likely not able to do given the directives of Section 251(f) — is adopt rules which establish a presumption against competition in rural markets as Bogue suggests. Rather, the Commission's rules should reflect Congress's will that rural telephone companies be subject to competition and interconnection in all cases except where an interconnection request would be "unduly economically burdensome" or "technically infeasible" or "inconsistent with 47. U S.C. § 254." Moreover, the Commission

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[10] *See* 47 U.S.C. § 214(e), 254 (1995).

[11] *See* 47 U.S.C. § 254.

should reject out of hand Bogue's attempt to insert into Commission rules the concept that a state commission reject an interconnection request unless the existing local telephone company's service is "inadequate," and the new entrant's service is a "necessity." Bogue Comments at 9. These are precisely the type of state statutory restrictions on competition that are meant to be preempted by the Act in favor of market-based solutions to telecommunications needs. Neither the FCC, nor the States, nor localities should decide who enters, prospers or exits a given market: the end users should make that decision. Bogue's proposed rules are counter intuitive and would violate both the letter and spirit of the Act. They should be rejected outright.

CONCLUSION

For the foregoing reasons, Classic respectfully requests this Commission to reject Bogue's interpretation of the Commission's authority under 47 U.S.C. §§ 251 and 252, and reject as well Bogue's proposed rural interconnection rules

Respectfully submitted,

CLASSIC TELEPHONE, INC.

By: ______________________

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May 30, 1996